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International Covenant on Civil and Political Rights

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Human Rights Committee

Communication No. 1890/2009

Views adopted by the Committee at its 110th session (10–28 March 2014)

Submitted by:	Franck Kitenge Baruani (represented by Anna Copeland, SCALES Community Legal Centre)
Alleged victim:	The author
State party:	Democratic Republic of the Congo
Date of communication:	9 June 2009 (initial submission)
Document references:	Special Rapporteur's rule 97 decision, transmitted to the State party on 3 August 2009 (not issued in document form)
Date of adoption of Views:	27 March 2014
Subject matter:	Arbitrary arrest and torture, being accused of spying for another country and wanting to overthrow the Government
Substantive issues:	Torture or cruel, inhuman or degrading treatment or punishment; arbitrary arrest; arbitrary or unlawful interference with privacy, family or home
Procedural issue:	Exhaustion of domestic remedies
Articles of the Covenant:	7; 9; 17
Article of the Optional Protocol:	5 (2 b)

[Annex]

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Annex

Views of the Human Rights Committee under the Optional Protocol to the International Covenant on Civil and Political Rights (110th session)

concerning

Communication No. 1890/2009*

Submitted by:	Franck Kitenge Baruani (represented by Anna Copeland, SCALES Community Legal Centre)
Alleged victim:	The author
State party:	Democratic Republic of the Congo
Date of communication:	9 June 2009 (initial submission)

The Human Rights Committee, established under article 28 of the International Covenant on Civil and Political Rights,

Having concluded its consideration of communication No. 1890/2009, submitted to the Human Rights Committee on behalf of Franck Kitenge Baruani under the Optional Protocol to the International Covenant on Civil and Political Rights,

Having taken into account all written information made available to it by the author of the communication and the State party,

Meeting on 27 March 2014,

Adopts the following:

Views under article 5, paragraph 4, of the Optional Protocol

1. The author of the communication is Franck Kitenge Baruani, a national of the Democratic Republic of the Congo and a permanent resident of Australia by virtue of a humanitarian visa. He was born on 27 December 1972. He claims to be a victim of a violation of articles 7, 9 and 17 of the International Covenant on Civil and Political Rights. The Democratic Republic of the Congo acceded to the Optional Protocol to the Covenant on 1 November 1976. The author is represented by counsel, Anna Copeland, SCALES Community Legal Centre.

* The following Committee members participated in the examination of the present communication: Mr. Yadh Ben Achour, Mr. Lazhari Bouzid, Ms. Christine Chanet, Mr. Ahmad Amin Fathalla, Mr. Cornelis Flinterman, Mr. Yuji Iwasawa, Mr. Walter Kälin, Ms. Zonke Zanele Majodina, Mr. Gerald L. Neuman, Sir Nigel Rodley, Mr. Victor Manuel Rodríguez-Rescia, Mr. Fabián Omar Salvioli, Ms. Anja Seibert-Fohr, Mr. Yuval Shany, Mr. Konstantine Vardzelashvili, Ms. Margo Waterval, and Mr. Andrei Paul Zlătescu.

The facts as presented by the author

2.1 The author was born in Bukavu, South Kivu province in the Democratic Republic of the Congo. In September 1998, a group of rebels emerged under the banner of the Congolese Rally for Democracy (Rassemblement congolais pour la démocratie) in opposition to the Government of Laurent Kabila and allegedly supported by Rwandan forces. The Rally for Democracy was recruiting men from North and South Kivu by force. In September 1998, the author was forcibly removed from the university campus, detained by the Rally for Democracy for two nights in Bukavu, together with 20 other students, and then taken on a bus to Gabiro in Rwanda, where he was held in a camp. During this time, his captors tried to recruit him to support them in their plan to overthrow Laurent Kabila. After 10 months in Rwanda, he was returned to the headquarters of the Rally for Democracy in Goma, Democratic Republic of the Congo, where he was supposed to work for the Rally for Democracy movement. However, he managed to escape and returned to Bukavu. Fearing for his life, he then decided to move to Lubumbashi, province of Katanga, Democratic Republic of the Congo. In Lubumbashi, he received a certificate issued by the national intelligence service attesting that he was an internally displaced person.

2.2 On 16 April 2002, while completing an internship, the author was arrested by the Presidential Special Police Department, who accused him of being a spy for Rwanda and looking to stage a coup against President Joseph Kabila, son of Laurent Kabila who had been assassinated in January 2001. At the time, the author's wife had just given birth to his daughter, who was six weeks old. Upon his detention, he was not provided with any information about the charges against him, where he was being taken to or for how long. For seven days, he was moved around and held in different locations in Lubumbashi, because his university colleagues and human rights defenders were looking for him.

2.3 On 23 April 2002, the author was taken to the premises of the national intelligence service (Agence nationale de renseignements) in Lubumbashi, where he was ill-treated for two days. He was regularly beaten and accused of being a spy. He was shackled at the hands and feet and was dragged like this from one cell to another. He feared he would be killed. Then, he was moved to the premises of the national intelligence service in Kinshasa on board a special presidential plane.[1] He was held there for six months.

2.4 In the premises of the intelligence service in Kinshasa, the author was held in two different rooms; in one room he spent the day and in the other he was tortured during the night.[2] He was elevated vertically upside down by a machine and was continually beaten on his genitalia, backside and head with a thick metal rod that carried an electric charge. When hanging upside down, large metal pliers were connected to his tongue, which would then be pulled by the officials requesting him to confess that he was planning to kill Kabila and take power in Kinshasa. After having been beaten in this position, the machine released him and he fell to the floor unsupported. He had his genitalia repeatedly connected to an electric charge which caused him severe pain. He was also repeatedly beaten, kicked and punched. The officials inflicting torture on him accused him of hiding in Rwanda and being the leader of Rwandan forces. They also asked him about his university studies. Before being returned to his cell, a bucket of water would be thrown over him. In addition, he was deprived of food and water. While being held at the premises of the intelligence service in

[1] The author notes that the pilot had a shirt, on which the word "Presidential" was embroidered on the collar.

[2] There is no information on the number of nights, during which he was exposed to the treatment he describes.

Kinshasa, the author had no contact with his wife and daughter and was very worried about them. As a consequence of the torture, he has had one testicle removed.[3]

2.5 In July 2002, without prior notice, the author was taken to the Court of State Security[4] where he was informed that he was suspected of being an intelligence officer for Rwanda, Burundi and Uganda; however, no evidence against him was presented. He was represented by L'Observatoire Nationale des Droits de l'Homme, whose Chair he had met while in detention in Kinshasa. The same month, the Court of State Security moved him to the Makala civilian prison in Kinshasa, but without making a finding of guilt or a determination as to his sentence.

2.6 On 4 October 2002, the author was released from Makala civilian prison following growing public pressure by human rights organizations and his Lubumbashi university colleagues. The release document from prison stated that he had been imprisoned for an attempt on the security of the State, however he has never been sentenced for any crime The author left for the Republic of the Congo seven days after his release from Makala prison because he feared for his safety. After arriving in the Congo, he registered with the Office of the United Nations High Commissioner for Refugees (UNHCR) and was granted refugee status in 2004. However, he was aware that his safety could not be guaranteed due the proximity of the two countries.

2.7 The author obtained a visa for Australia through UNHCR. He and his family moved to Australia on 21 August 2007. He has obtained trauma and torture counselling since arriving in Australia. According to his trauma counsellor, he suffers long-term consequences of the trauma of his detention and torture, including issues to do with sleep, appetite, somatic pain and interpersonal problems.

The complaint

3.1 The author claims that the available domestic remedies were ineffective,[5] as the Government was the perpetrator of the breaches against him and that those breaches were directly linked to the President and the executive.[6] He further claims that due to the threats on his life and the fear he felt, no remedy could safely be sought whilst he was in the Democratic Republic of the Congo.

3.2 The author claims that the State party has violated his right to be free from torture, cruel, inhuman and degrading treatment or punishment under article 7 of the Covenant. He states that the acts committed against him by the Congolese authorities during his detention amounted to torture.[7]

3.3 Moreover, the author claims that the State party has violated his right to be free from arbitrary arrest and detention under article 9, paragraph 1. He claims that his detention was not reasonable, necessary, proportionate, appropriate or justifiable and therefore arbitrary in

[3] A medical certificate of 14 May 2008 attests to a testicular operation post trauma, as well as to lower limb weakness related to spinal problems.

[4] The author claims that the Chair of the Court is nominated by the President and lacks independence.

[5] See communications No. 004/1977, *Ramirez v. Uruguay*, Views adopted on 23 July 1980, and No. 962/2001, *Mulezi v. Democratic Republic of the Congo*, Views adopted on 8 July 2004.

[6] See the preliminary note of the Special Rapporteur on the independence of judges and lawyers on his mission to the Democratic Republic of the Congo (A/HRC/4/25/Add. 3), in which he concluded that interference by the executive and the army in judicial proceedings was very common and that the judicial system was rarely effective.

[7] See communications No. 124/1982, *Muteba v. Zaire*, Views adopted on 24 July 1984; No. 194/1985, *Miango Muiyo v. Zaire*, Views adopted on 27 October 1987; and No. 005/1977, *Massera v. Uruguay*, Views adopted on 15 August 1979.

the sense of article 9, paragraph 1.[8] He argues that there are no factors particular to him as an individual that would have rendered his detention and imprisonment necessary and reasonable. Whilst in detention, he was not informed of any charges against him, nor was he provided with any details of them.

3.4 The author also claims that the State party has violated his right not to be subjected to arbitrary interference with his privacy, family or home under article 17.[9] He submits that his detention, which forced him to be separated from his wife and newborn daughter, amounts to an interference with his family life. He was deeply affected and mentally distressed by this separation.[10] He states that the interference with his privacy and family was arbitrary because he was taken from his place of employment, he received no notification of the charge against him, there was no judicial review of his detention and he did not have a full hearing with procedural safeguards. No consideration was given to the author's family in these processes and he was unable to communicate with his family between April and October 2002.

The State party's failure to cooperate

4. On 3 August 2009, 16 March 2010, 20 October 2010, 25 January 2011 and 19 November 2013, the State party was requested to submit to the Committee information on the admissibility and merits of the communication. The Committee notes that this information has not been received. The Committee regrets the failure of the State party to provide any information with regard to the admissibility or the merits of the author's claims. It recalls that it is implicit in article 4, paragraph 2, of the Optional Protocol that States parties examine in good faith all allegations brought against them and that they make available to the Committee all the information at their disposal. In the absence of a reply from the State party, due weight must be given to the author's allegations, to the extent that they are substantiated.

Issues and proceedings before the Committee

Consideration of admissibility

5.1 Before considering any claim contained in a communication, the Human Rights Committee must, in accordance with article 93 of its rules of procedure, decide whether or not it is admissible under the Optional Protocol to the Covenant.

5.2 As required under article 5, paragraph 2 (a), of the Optional Protocol, the Committee has ascertained that the same matter is not being examined under another procedure of international investigation or settlement.

5.3 Having taken note of the author's arguments concerning the exhaustion of domestic remedies and taking into account the lack of cooperation by the State party, the Committee concludes that there is nothing in article 5, paragraph 2 (b), of the Optional Protocol to prevent it from considering the communication.

5.4 The Committee notes the author's allegations that he was ill-treated from 23 to 25 April 2002 in the premises of the national intelligence service in Lubumbashi, that he was

[8] See communications No. 1050/2002, *D and E v. Australia*, Views adopted on 11 July 2006; No. 560/1993, *A. v. Australia*, Views adopted on 3 April 1997, paras. 9.2 and 9.3; No. 305/1988, *Van Alphen v. the Netherlands*, Views adopted on 23 July 1990, para. 5.8; and No. 1324/2004, *Shafiq v. Australia*, Views adopted on 31 October 2006, para. 7.2.

[9] See general comment No. 16 (1988) on article 17 (right to privacy).

[10] This is confirmed by a statement from his trauma counsellor in Australia.

subjected to torture during his detention at the premises of the national intelligence service in Kinshasa from April to July 2002, that he was arbitrarily detained and that his detention forced him to be separated from his family which caused him deep mental distress. In the absence of any reply by the State party, the Committee considers that, for purposes of admissibility, the author has sufficiently substantiated his claims under articles 7, 9 and 17, of the Covenant.

5.5 Having found no impediment to the admissibility of the author's claims under articles 7, 9 and 17 of the Covenant, the Committee proceeds to their examination on the merits.

Consideration of the merits

6.1 The Human Rights Committee has considered the present communication in light of all the information made available to it, as required under article 5, paragraph 1, of the Optional Protocol.

6.2 The Committee notes the author's allegations under article 7 that from 23 to 25 April 2002, he was ill-treated in the premises of the national intelligence service in Lubumbashi by officials who accused him of being a spy. He was subjected to regular beatings and feared he would be killed. The Committee further notes the author's allegations that, during the six months that he was detained at the premises of the national intelligence services in Kinshasa, he was subjected to various brutal forms of torture. It also notes that he was deprived of food and water and that he did not have any contact with his family. Finally, it notes that according to his trauma counsellor, the author suffers long-term consequences of the trauma of his detention and torture, including issues to do with sleep, appetite, somatic pain and interpersonal problems.

6.3 The Committee recalls that the State party has a duty to investigate in good faith all allegations of violations of the Covenant made against it and to furnish to the Committee the information available to it. In cases where the allegations are corroborated by credible evidence submitted by the author and where further clarification depends on information that is solely in the hands of the State party, the Committee may consider an author's allegations to be substantiated in the absence of satisfactory evidence or explanations to the contrary presented by the State party. In the absence of any explanations from the State party, due weight must be given to the author's allegations.[11]

6.4 On the basis of the information at its disposal, and recalling that article 7 allows no limitation, even in situations of public emergency,[12] the Committee finds that the treatment to which the author was subjected by officials of the national intelligence services, with the aim of obtaining a confession of his involvement with the Government of Rwanda and his plan to overthrow the Government of the Democratic Republic of the Congo, reveals a violation of article 7 of the Covenant.

6.5 Regarding article 9 of the Covenant, the Committee notes that the author was arrested on 16 April 2002 by the Presidential Special Police Department, that he was brought before the Court of State Security in July 2002 and that he was held in detention

[11] See communications No. 1761/2008, *Giri v. Nepal*, Views adopted on 24 March 2011, para. 7.4; No. 1295/2004, *El Alwani v. Libyan Arab Jamahiriya*, Views adopted on 11 July 2006, para. 6.5; No. 1422/2005, *El Hassy v. Libyan Arab Jamahiriya*, Views adopted on 24 October 2007, para. 6.2; No. 540/1993, *Basilio Laureano Atachahua v. Peru*, Views adopted on 25 March 1996, para. 8.5; and No. 458/1991, *Mukong v. Cameroon*, Views adopted on 21 July 1994, para. 9.4.

[12] Article 4 of the Covenant and general comment No. 20 (1992) of the Committee on article 7 (Prohibition of torture, or other cruel, inhuman or degrading treatment or punishment), para. 3.

until 4 October 2002. Referring to paragraph 4 of its general comment No. 8 (1982) on article 9 of the Covenant (Right to liberty and security of persons) and to its jurisprudence, the Committee recalls that the notion of "arbitrariness" is not to be equated with "against the law", but must be interpreted more broadly to include elements of inappropriateness, injustice, lack of predictability and due process of law.[13] This means that remand in custody must not only be lawful, but reasonable and necessary in all the circumstances.

6.6 The information before the Committee suggests that the author was arrested without a warrant by the Presidential Special Police Department, that he was accused of being a spy for Rwanda and looking to stage a coup against the President. Furthermore, the information before the Committee does not show that formal charges were presented against the author, or that he was informed of the reasons for his arrest, or its legal basis. He was held in detention from 16 April 2002 until July 2002, without access to legal assistance, and he had no contact with his family until his release in October 2002. He was taken to court without prior notice, no evidence was presented against him and he was never convicted of any crime. In the absence of any explanations by the State party on the legality, reasonableness and necessity of the author's detention, the Committee considers that there has been a violation of article 9, paragraph 1.

6.7 It also finds that while being accused of crimes against public security, the absence of any formal charges, information on the grounds for, and legal basis of, the author's arrest and detention reveals a violation of article 9, paragraph 2.

6.8 Moreover, the Committee recalls paragraph 2 of its general comment No. 8 and its jurisprudence,[14] according to which the meaning of the term "promptly" in article 9, paragraph 3, must be determined on a case-by-case basis, but that delays should not exceed a few days. The Committee further recalls that the period of police custody before a detained person is brought before a judge should not exceed 48 hours.[15] Any longer period of delay would require special justification to be compatible with article 9, paragraph 3, of the Covenant.[16] The Committee therefore considers the delay of three months before bringing the author before a judge to be incompatible with the requirement of promptness set forth in article 9, paragraph 3 of the Covenant and thus constitutes a violation thereof.

6.9 Furthermore, the Committee considers that, in the absence of any evidence presented to the author relating to the accusations against him and his having been detained without having access to a lawyer or any contact with his family, effectively prevented him from challenging the legality of his detention before a court and therefore also breaches article 9, paragraph 4.

6.10 Having found a violation of articles 7 and 9 of the Covenant, the Committee will not consider the author's complaint related to the violation of article 17 of the Covenant.

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[13] See communications No. 1134/2002, *Gorji-Dinka v. Cameroon*, Views adopted on 17 March 2005, para. 5.1, and *van Alphen v. Netherlands*, para. 5.8.

[14] The Committee found that, in the absence of any explanations by the State party, a delay of three days in bringing a person before a judge did not meet the requirement of promptness within the meaning of article 9, paragraph 3 (see communication No. 852/1999, *Borisenko v. Hungary*, Views adopted on 14 October 2002, para. 7.4). See also communications No. 1910/2009, *Zhuk v. Belarus*, Views adopted on 30 October 2013, para. 8.3; No. 2120/2011, *Kovaleva and Kozyar v. Belarus*, Views adopted on 29 October 2012, para. 11.3 and No. 1787/2008, *Kovsh v. Belarus*, Views adopted on 27 March 2013, paras. 7.3–7.5.

[15] See communication No. 1592/2007, *Pichugina v. Belarus*, Views adopted on 17 July 2013, para. 7.4.

[16] See *Borisenko v. Hungary*, para. 7.4. See also principle 7 of the Basic Principles on the Role of Lawyers, adopted at the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders (United Nations publication, Sales No. E.91.IV.2).

7. The Human Rights Committee, acting under article 5, paragraph 4, of the Optional Protocol to the International Covenant on Civil and Political Rights, is of the view that the information before it discloses violations by the State party of articles 7 and 9 of the Covenant.

8. In accordance with article 2, paragraph 3, of the Covenant, the State party is under an obligation to provide the author with an effective remedy, including by (a) conducting a thorough and effective investigation into his allegations of torture and ill-treatment; (b) prosecuting, bringing to trial and punishing those responsible for the violations committed; and (c) providing adequate compensation and a formal public apology to the author and his family for the violations suffered. The State party should also take steps to prevent similar violations from occurring in the future.

9. Bearing in mind that, by becoming a party to the Optional Protocol, the State party has recognized the competence of the Committee to determine whether or not there has been a violation of the Covenant and that, pursuant to article 2 of the Covenant, the State party has undertaken to ensure to all individuals within its territory or subject to its jurisdiction the rights recognized in the Covenant and to provide an effective and enforceable remedy when a violation has been established, the Committee wishes to receive from the State party, within 180 days, information about the measures taken to give effect to the Committee's Views. The State party is also requested to publish the present Views in all official languages.

[Adopted in English, French and Spanish, the English text being the original version. Subsequently to be issued also in Arabic, Chinese and Russian as part of the Committee's annual report to the General Assembly.]